

## **Table of Contents**

### **Chapter 9**

<b>DIPLOMATIC RELATIONS, SUCCESSION, CONTINUITY OF STATES, AND OTHER STATEHOOD ISSUES</b>	<a href="#"><u>271</u></a>
<b>A. DIPLOMATIC RELATIONS</b>	<a href="#"><u>271</u></a>
<b>B. STATUS ISSUES</b>	<a href="#"><u>271</u></a>
1. Recognition of South Sudan	<a href="#"><u>271</u></a>
2. Transitional National Council in Libya	<a href="#"><u>276</u></a>
<b>C. EXECUTIVE BRANCH AUTHORITY OVER FOREIGN STATE RECOGNITION AND PASSPORT ISSUANCE</b>	<a href="#"><u>278</u></a>
<b>Cross References</b>	<a href="#"><u>283</u></a>

## Chapter 9

### Diplomatic Relations, Succession, Continuity of States, and Other Statehood Issues

#### A. DIPLOMATIC RELATIONS

After the United States suspended operations of its embassy in Tripoli, the Republic of Turkey agreed in April 2011 to represent the United States in Libya and protect United States citizens and interests in accordance with the Vienna Convention on Diplomatic Relations. After the Turkish embassy in Tripoli suspended operations, the Republic of Hungary agreed to act as protecting power for the United States beginning in June 2011. When the United States resumed operations of its embassy in Tripoli in September 2011, Hungary ceased acting as protecting power for the United States in Libya. This was the first time that either the Government of Turkey or the Government of Hungary had acted as protecting power for the United States. Other governments which have served in this role during the last century include Switzerland (representing U.S. interests in Cuba from 1961 to the present and Iran from 1980 to the present); Sweden (representing U.S. interests in the Democratic Republic of North Korea from 1996 to the present); Belgium (representing U.S. interests in Libya from 1991-2004); Poland (representing U.S. interests in Iraq from 1991-2004). See *Digest 1989-90* at 241-42 for background on instances in which foreign governments have acted as protecting powers for the United States.

#### B. STATUS ISSUES

##### 1. Recognition of South Sudan

On February 7, 2011, after a referendum in which a majority of the people of Southern Sudan voted in favor of independence, the United States announced its intention to recognize South Sudan as a sovereign, independent state. President Obama's statement on the referendum appears below. Daily Comp. Pres Docs. 2011 DCPD No. 00073, p. 1.

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\* \* \* \*

On behalf of the people of the United States, I congratulate the people of Southern Sudan for a successful and inspiring referendum in which an overwhelming majority of voters chose independence. I am therefore pleased to announce the intention of the United States to formally recognize Southern Sudan as a sovereign, independent state in July 2011.

After decades of conflict, the images of millions of southern Sudanese voters deciding their own future was an inspiration to the world and another step forward in Africa's long journey toward justice and democracy. Now all parties have a responsibility to ensure that this historic moment of promise becomes a moment of lasting progress. The Comprehensive Peace Agreement must be fully implemented and outstanding disputes must be resolved peacefully. At the same time, there must be an end to attacks on civilians in Darfur and a definitive end to that conflict.

As I pledged in September when addressing Sudanese leaders, the United States will continue to support the aspirations of all Sudanese—north and south, east and west. We will work with the Governments of Sudan and Southern Sudan to ensure a smooth and peaceful transition to independence. For those who meet all of their obligations, there is a path to greater prosperity and normal relations with the United States, including examining Sudan's designation as a state sponsor of terrorism. And while the road ahead will be difficult, those who seek a future of dignity and peace can be assured that they will have a steady partner and friend in the United States.

\* \* \* \*

In July, in accordance with President Obama's stated intention above, the United States proceeded with arrangements to formally recognize South Sudan and establish diplomatic relations. The exchange of letters between President Obama and the president of the Republic of South Sudan, set forth below, described the arrangements for establishing relations between the two countries.

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\* \* \* \*

THE WHITE HOUSE  
WASHINGTON

July 7, 2011

His Excellency  
Salva Kiir Mayardit  
President of the Republic of South Sudan  
Juba

Dear Mr. President:

On behalf of my government, I congratulate the people of South Sudan on their independence. I am pleased to propose the following arrangements on the basis for the establishment of diplomatic relations between the United States and the Republic of South Sudan.

First, I seek your concurrence that our diplomatic and consular services be conducted in accordance with the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, and in particular, that the status and privileges and immunities of the U.S.

Embassy and their respective members be governed by these agreements.

Second, I seek your confirmation that the Republic of South Sudan commits to fulfill the existing obligations to the United States, including existing treaty obligations, of the Republic of Sudan, as well as the Regional Assistance and Grant Agreement concluded between the United States Agency for International Development and the Government of South Sudan. As relations between our two countries progress, we are, of course, prepared to review any such treaties to determine whether they should be revised, terminated, or replaced to take into account developments in United States-South Sudanese relations. I also seek your assurances that the Republic of South Sudan assumes the appropriate responsibility for the Republic of Sudan's financial obligations, including its foreign debt, as agreed between the Republic of Sudan and the Republic of South Sudan.

Third, I wish to notify you that the U.S. Consulate in Juba is to be converted into the Embassy of the United States with your concurrence. Under separate cover, we intend to provide the names of the members of the Embassy of the United States to be accredited in Juba and their family members. The United States Government welcomes the establishment by the Republic of South Sudan of diplomatic representation in the United States, and awaits a request for agrément, as well as the names of the members to be accredited to the Embassy of the Republic of South Sudan in Washington, D.C.

I look forward to receiving your concurrence, by reply to this note, to the establishment of diplomatic relations, as well as to these arrangements and to the continued development of cordial and productive relations between South Sudan and the United States of America.

Sincerely,  
[signed by Barack Obama]

\* \* \* \*

*Government of Southern Sudan*  
*Office of the President*

GOSS/PO/J/1.E.1

09/07/2011

The Honourable Barack H. Obama,  
President of the United States of America,  
The White House,  
Washington, D.C.  
USA

Dear Mr. President,

On behalf of the Government and people of Southern Sudan and on my own behalf, I take this opportunity to thank the Government and people of the United States of America for the prompt recognition of the Republic of South Sudan. As a result, I am pleased to confirm the following arrangements as the basis for the establishment of diplomatic relations between the Republic of South Sudan and the United States of America.

First, I concur that our diplomatic relations be conducted in accordance with the **Vienna Convention on Diplomatic Relations** and the **Vienna Convention on Consular Relations**, and in particular, that the status, privileges and immunities of the United States Embassy and Consulates and their respective members be governed by these agreements.

Second, I confirm that the Republic of South Sudan commits to fulfill the existing obligations to the United States of America, including the existing treaty obligations of the Republic of Sudan, as well as the Regional Assistance and Grant Agreement concluded between the United States Agency for International Development and the Government of Southern Sudan on May 9, 2011. As relations between our two countries progress, we will be prepared to review any such treaties to determine whether they should be revised, terminated or replaced to take into account developments in U.S.-South Sudanese relations.

Mr. President, I would also liked to assure you that the Republic of South Sudan assumes the appropriate responsibility for the Republic of Sudan's International Financial Obligations, including its Foreign Debt as resolved between the Republic of Sudan and the Republic of South Sudan in post-referendum arrangements.

Finally, we concur with your request to upgrade the United States Consulate in Juba to become the Embassy of the United States of America to the Republic of South Sudan. We have included a list of the names of members of the Embassy of South Sudan in the United States of America and their family members under separate cover. We intend to submit request for agreement as well as provide to you the names of the members of the Embassy of the Republic of South Sudan to be accredited in Washington, D.C. and their family members.

We look forward to the continued development of cordial and productive relations between the Republic of South Sudan and the United States of America.

[signed]

Gen Salva Kiir Mayardit,

First Vice President of the Republic of the Sudan and President  
of the Government of Southern Sudan,  
JUBA, SOUTHERN SUDAN

\* \* \* \*

On July 9, 2011, South Sudan formally declared independence based on the results of the referendum held in January 2011. On that same day, the United States recognized the Republic of South Sudan as an independent and sovereign state. President Obama's statement recognizing South Sudan as an independent and sovereign state is excerpted below. Daily Comp. Pres Docs. 2011 DCPD No. 00497, p. 1.

\* \* \* \*

I am proud to declare that the United States formally recognizes the Republic of South Sudan as a sovereign and independent state upon this day, July 9, 2011. After so much struggle by the people of South Sudan, the United States of America welcomes the birth of a new nation.

\* \* \* \*

This historic achievement is a tribute, above all, to the generations of Southern Sudanese who struggled for this day. It is also a tribute to the support that has been shown for Sudan and South Sudan by so many friends and partners around the world. Sudan's African neighbors and the African Union played an essential part in making this day a reality. And along with our many international and civil society partners, the United States has been proud to play a leadership role across two administrations. Many Americans have been deeply moved by the aspirations of the Sudanese people, and support for South Sudan extends across different races, regions, and political persuasions in the United States. I am confident that the bonds of friendship between South Sudan and the United States will only deepen in the years to come. As Southern Sudanese undertake the hard work of building their new country, the United States pledges our partnership as they seek the security, development, and responsive governance that can fulfill their aspirations and respect their human rights.

As today also marks the creation of two new neighbors, South Sudan and Sudan, both peoples must recognize that they will be more secure and prosperous if they move beyond a bitter past and resolve differences peacefully. Lasting peace will only be realized if all sides fulfill their responsibilities. The Comprehensive Peace Agreement must be fully implemented, the status of Abyei must be resolved through negotiations, and violence and intimidation in Southern Kordofan, especially by the Government of Sudan, must end. The safety of all Sudanese, especially minorities, must be protected. Through courage and hard choices, this can be the beginning of a new chapter of greater peace and justice for all of the Sudanese people.

\* \* \* \*

On July 13, 2011, the United Nations Security Council recommended unanimously that South Sudan be admitted to the United Nations as its 193<sup>rd</sup> member state. Ambassador Susan Rice, U.S. Permanent Representative to the United Nations, welcomed the Security Council's action in remarks delivered that day, reprinted below and available at <http://usun.state.gov/briefing/statements/2011/168176.htm>. For Ambassador Rice's remarks at the General Assembly meeting on South Sudan on July 13, 2011, see <http://usun.state.gov/briefing/statements/2011/168552.htm>. As of December 31, 2011, 115 states had recognized South Sudan.

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\* \* \* \*

Last Saturday, I had the honor of heading the U.S. delegation to Juba to celebrate South Sudan's independence. It was a deeply moving day. After a half-century of war, at a cost of more than two million lives, the Republic of South Sudan can now finally determine its own future. The United States salutes the courage and sacrifice of the people of South Sudan, who never abandoned hope. After so many years of bitter conflict, South Sudan's independence occurred peacefully and democratically through referendum—a heartening way for the world's newest nation to be born.

Vice President Machar, welcome and congratulations to the people of the Republic of South Sudan. We are delighted that you are here to represent your new government at this meeting where the Security Council unanimously recommended that your country be admitted as the United Nation's 193rd member state.

Ambassador Osman, we also commend the Government of Sudan's decision to be the first country to recognize South Sudan's independence. We welcome all efforts to forge a relationship between Sudan and South Sudan that is rooted in mutual respect and cooperation—a relationship that strengthens the viability, security, and prosperity of both states. By continuing on the path of peace, the Government of Sudan can redefine its relationship with the international community and secure a brighter future for its people.

Mr. President, the Security Council remains fully engaged in helping both countries towards their shared goals of peace and stability. On July 8, this Council unanimously authorized a new UN peacekeeping mission in the Republic of South Sudan. UNMISS will assist the government as it builds a new nation, including on issues of peacebuilding, development, security, and protection.

But as we all know, this moment of promise is also fragile and fraught. Sudan and South Sudan must work hard to secure an enduring peace and two viable states coexisting as peaceful neighbors. It is vital that both countries work with the African Union High-Level Implementation Panel to swiftly resolve all outstanding issues. The parties need to finalize arrangements on the border, citizenship, oil, and other issues if they are to forge an enduring peace.

\* \* \* \*

Mr. President, the challenges are great, but they are by no means insurmountable. The Security Council has done its utmost to support this process, and this Council and my government will remain deeply engaged in supporting the Republic of South Sudan at this crucial juncture and into the future.

My own country's history has taught us that it takes moral courage to attain freedom—and make freedom's promise real for all citizens. We've learned that this work is never done. We have great faith in the people of South Sudan. We expect they will create a government that works for the good of all people and for the stability of the region—and thereby create a country that strengthens this community of sovereign nations. As I said in Juba on Saturday, "a nation born from conflict need not live in conflict." In this spirit, and with great hope for the future of the world's newest nation, the United States wholeheartedly supports South Sudan's application for membership in the United Nations. Congratulations, and we look forward to welcoming you.

\* \* \* \*

## **2. Transitional National Council in Libya**

On July 15, 2011, the United States recognized the TNC as the "legitimate governing authority" in Libya and stated that it no longer recognized the regime of Muammar Qadhafi. In a special briefing, excerpted below and available in full at [www.state.gov/r/pa/prs/ps/2011/07/168662.htm](http://www.state.gov/r/pa/prs/ps/2011/07/168662.htm), State Department officials explained how the TNC qualified for such recognition. Secretary Clinton also announced the recognition of the TNC as the government of Libya in remarks to the press, available at

[www.state.gov/secretary/rm/2011/07/168656.htm](http://www.state.gov/secretary/rm/2011/07/168656.htm).

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\* \* \* \*

So we have been taking steps progressively over the course of the past few months to increase our engagement with the TNC to understand better its functions, its purposes, its objectives, and how it's acting in its capacity as a representative of the Libyan people. . . .

And then today, we took the additional step, as you ...have seen, of stating that until an interim authority is in place, we will recognize the TNC as the legitimate governing authority of Libya and deal with them on that basis and that we no longer recognize the Qadhafi regime as having any legitimate governing authority.

. . . [W]e've come to increasingly understand better and grow more comfortable with their stated commitments and efforts thus far to live up to those commitments, and we heard a number of assurances from them, both publicly and privately over the past several days, including their outline of a roadmap and a presentation today on the future of Libya and how they see the transition unfolding.

Those assurances go to issues like upholding their international obligations, pursuing a democratic reform process that is inclusive both in the geographic and in the political sense and dispersing any funds under their control in a transparent manner for the benefit of all the Libyan people.

And so one of the first predicates for us moving to the next step of recognizing them as the legitimate governing authority for this interim period was the statements and actions that they've taken to date. We'll continue to watch closely how they perform their functions moving forward both in terms of providing for those parts of Libya under their control and as they work through a political process and an eventual post-Qadhafi Libya.

\* \* \* \*

Finally, I would say that there is a practical consequence to this step of recognition, which is that we expect it will allow us to help the TNC access additional funds, and we are consulting with the TNC and working through a number of technical and legal details internally, and we're also consulting with our international partners on both the most effective and appropriate method for helping the TNC access those funds. So that's where we are.

The Contact Group as a whole has embraced the proposition that participants of the Contact Group will deal with the TNC as the legitimate governing authority of Libya until a new interim authority is in place, and that like us, they view the Qadhafi regime as not having any legitimate governing authority in Libya at this time. So this is not merely a statement by the United States of our position with respect to this issue, but a reflection of a growing international consensus about the way forward. . . .

\* \* \* \*

After the death of Qadhafi (on October 20) and the TNC's announcement that the country had been liberated (on October 23), the UN Security Council unanimously voted on October 27, 2011, to lift the no-fly zone over Libya and end operations to protect civilians



there, as authorized by Resolution 1973. On October 27, Ambassador Susan E. Rice, U.S. Permanent Representative to the UN, addressed the Security Council on the adoption of Resolution 2016 lifting the no-fly zone. Excerpts from her remarks follow. The full text is available at <http://usun.state.gov/briefing/statements/2011/176289.htm>.

\* \* \* \*

We are quite pleased that the Security Council has unanimously passed Resolution 2016, terminating the protection of civilians and no-fly zone authorizations that were contained in historic Resolution 1973. This has been quite an extraordinary period of activity for the Security Council, as well as for the United States, NATO, and Arab partners who participated in the enforcement of Resolution 1973.

And today, many months later, we have the prospect for a free and inclusive Libya, in which the aspirations of the Libyan people can finally be realized in the wake of the transition that's underway. We're very concerned that, as we move forward, that the authorities make maximum effort to swiftly form an inclusive government that incorporates all aspects of Libyan society, and in which the rights of all Libyan people are fully and thoroughly respected, regardless of their gender, their religion, their region of origin, et cetera. But for the United States, and, I think, for the United Nations Security Council, this closes what I think history will judge to be a proud chapter in the Security Council's history, and an experience where it acted promptly and effectively to prevent mass slaughter in Benghazi and other parts of the east, and to effectively protect civilians over the course of the last many months.

\* \* \* \*

### C. EXECUTIVE BRANCH AUTHORITY OVER FOREIGN STATE RECOGNITION AND PASSPORT ISSUANCE

On May 2, 2011, the United States Supreme Court granted a petition for writ of certiorari in a case challenging the denial by the State Department of a request that "Israel" be listed as the place of birth in the passport of a U.S. citizen child born in Jerusalem. *Zivotofsky v. Secretary of State*, 131 S. Ct. 2897 (May 2, 2011). The U.S. District Court for the District of Columbia had dismissed the suit, brought by the parents of a child born in Jerusalem on his behalf, seeking to compel the State Department's implementation of a Congressional mandate in § 214(d) of the FY2003 Foreign Relations Authorization Act, Pub. L. No. 107-228, 116 Stat. 1350, which directs that "Israel" appear as the place of birth for a U.S. citizen born in Jerusalem, when the citizen so requests. The U.S. Court of Appeals for the District of Columbia Circuit affirmed the dismissal, finding the case nonjusticiable under the political question doctrine because the President had exercised authority left exclusively to the executive branch—the power to recognize foreign governments—when determining not to recognize any government as sovereign over Jerusalem. In granting certiorari, the Supreme Court directed the parties to "brief and argue the following question: 'Whether Section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003, impermissibly infringes the

President's power to recognize foreign sovereigns.'" For prior developments in the case, see *Digest 2006* at 530-47, *Digest 2007* at 437-43, *Digest 2008* at 447-54, and *Digest 2009* at 303-10.

In September 2011, the United States filed its brief in the Supreme Court, excerpted below (with most footnotes and citations to the record omitted) and available in full at [www.justice.gov/osq/briefs/2011/3mer/2mer/2010-0699.mer.aa.pdf](http://www.justice.gov/osq/briefs/2011/3mer/2mer/2010-0699.mer.aa.pdf).<sup>\*</sup>

\* \* \* \*

### STATEMENT

The status of the city of Jerusalem is one of the most sensitive and longstanding disputes in the Arab-Israeli conflict. For the last 60 years, the United States' consistent policy has been to recognize no state as having sovereignty over Jerusalem, leaving that issue to be decided by negotiations between the relevant parties within the peace process. This policy is rooted in the Executive's assessment that "[a]ny unilateral action by the United States that would signal, symbolically or concretely, that it recognizes that Jerusalem is a city that is located within the sovereign territory of Israel would critically compromise the ability of the United States to work with Israelis, Palestinians and others in the region to further the peace process." The Executive similarly does not recognize Palestinian claims to current sovereignty in Jerusalem, the West Bank, or the Gaza Strip, pending the outcome of these negotiations.

One of the ways the State Department has implemented the United States' policy concerning the status of Jerusalem is in its rules regarding place-of-birth designations in passports and consular reports of birth abroad issued to U.S. citizens born in Jerusalem. Because the United States does not currently recognize any country as having sovereignty over Jerusalem, only "Jerusalem" is recorded as the place of birth in the passports and reports of birth of U.S. citizens born in that city. Petitioner challenges this policy, seeking to have "Israel" designated as his place of birth. He relies on Section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003, which is entitled "United States Policy with Respect to Jerusalem as the Capital of Israel," and which purports to require the State Department to make such a designation upon request. Pub. L. No. 107-228, 116 Stat. 1350, 1366.

\* \* \* \*

The Constitution assigns a broad range of foreign-affairs powers ... to the President alone. ... [O]f particular relevance to this case, the Constitution assigns to the President alone the authority to "receive Ambassadors and other public Ministers." Art. II, § 3. That power includes the authority to decide which ambassadors the President will receive and, hence, the power to decide with which governments to establish diplomatic relations. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964); *United States v. Pink*, 315 U.S. 203, 229 (1942) (same).

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<sup>\*</sup> Editor's note: On March 26, 2012, the Supreme Court issued its decision that the case does not present a nonjusticiable, political question and could properly be decided by the lower courts, remanding for a determination of the constitutionality of the statute. *Digest 2012* will discuss further developments in the case.

\* \* \* \*

United States policy concerning the status of Jerusalem is reflected in the State Department's policies for preparing passports and reports of birth abroad of U.S. citizens born in Jerusalem. As a general rule in passport administration, the country that the United States recognizes as having sovereignty over the place of birth of a passport applicant is recorded in the passport. See 7 *Foreign Affairs Manual (FAM)* 1383.1 (1987). Because the United States does not currently recognize any country as having sovereignty over Jerusalem, only "Jerusalem" is recorded as the place of birth in the passports of United States citizens born in that city. 7 *FAM* 1383.5-6, exh. 1383.1. Similarly, because the United States recognizes no state as having sovereignty over the territories of the West Bank and Gaza Strip, State Department rules mandate recording "West Bank" and "Gaza Strip" in the passports of United States citizens born in those locations. 7 *FAM* 1383.5-5.

\* \* \* \*

Congress has occasionally attempted to constrain the Executive Branch's ability to implement its recognition policy with respect to Jerusalem. ...

In 1995, Congress passed the Jerusalem Embassy Act of 1995, which states that the "[p]olicy of the United States" is that "Jerusalem should be recognized as the capital of Israel," and which purports to condition a portion of State Department funding on moving the U.S. Embassy to Jerusalem. Pub. L. No. 104-45, § 3(a) and (b), 109 Stat. 399 (enacted into law without President's signature). While Congress was considering the bill, the Office of Legal Counsel (OLC) advised the President that the bill would unconstitutionally infringe the President's recognition power. See Bill to Relocate United States Embassy from Tel Aviv to Jerusalem, 19 Op. Off. Legal Counsel 123 (1995). As enacted, the statute contains a waiver provision that permits the President to suspend the funding restriction for six months at a time to "protect the national security interests of the United States." § 7, 109 Stat. 400. Since the provision's enactment, Presidents Clinton, Bush, and Obama have repeatedly made the necessary finding to invoke the waiver provision and maintain the U.S. Embassy in Tel Aviv. See, e.g., 76 Fed. Reg. 35,713 (2011).

In 2002, Congress passed and the President signed the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350. Section 214 of that Act, entitled "United States Policy with Respect to Jerusalem as the Capital of Israel," contains various provisions relating to Jerusalem. Subsection (a) "urges the President \* \* \* to immediately begin the process of relocating the United States Embassy in Israel to Jerusalem." § 214(a), 116 Stat. 1365. Subsection (b) states that none of the funds authorized to be appropriated by the Act may be used to operate the United States consulate in Jerusalem unless that consulate "is under the supervision of the United States Ambassador to Israel." § 214(b), 116 Stat. 1366. Subsection (c) states that none of the funds authorized to be appropriated may be used for publication of any "official government document which lists countries and their capital cities unless the publication identifies Jerusalem as the capital of Israel." § 214(c), 116 Stat. 1366. And Subsection (d), on which petitioner relies, states that, "[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of

Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." § 214(d), 116 Stat. 1366.

At the time of enactment, President Bush stated that if Section 214 were construed to impose a mandate, it would "impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states." *Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003*, 2002 Pub. Papers 1697, 1698 (Sept. 30, 2002). Even though it was accompanied by a Presidential Statement making clear that "U.S. policy regarding Jerusalem has not changed," *ibid.*, Section 214 provoked strong condemnation in the Middle East and confusion about United States policy toward Jerusalem.

\* \* \* \*

### SUMMARY OF ARGUMENT

Petitioner's claim that he is entitled under Section 214(d) to have the Secretary of State designate "Israel" as his place of birth on his passport and consular report of birth abroad should be dismissed on either of two grounds. The claim presents a nonjusticiable political question. But even if the claim is justiciable, Section 214(d) is an unconstitutional encroachment on Executive authority. Both conclusions flow from the Constitution's grant to the President of the exclusive power to recognize foreign sovereigns and determine the extent of their territorial sovereignty, as well as the power to determine the content of passports in connection with the conduct of United States foreign policy.

I. A. Longstanding Executive Branch practice, congressional acquiescence, and judicial precedent establish that the President's express constitutional authority to "receive Ambassadors and other public Ministers" encompasses the exclusive power to recognize foreign states and their governments. U.S. Const. Art. II, § 3. Presidents have unilaterally exercised this recognition power since the Washington Administration. And although Members of Congress have occasionally proposed bills that would involve the Legislature in recognition decisions, those efforts have been rebuffed as inconsistent with the Constitution's assignment of such matters to the Executive alone.

Courts, including this Court, have consistently held that the constitutional recognition power belongs exclusively to the President. See, e.g., *United States v. Pink*, 315 U.S. 203, 229 (1942). This Court has also held that the recognition power includes all implied authorities necessary to effectuate its exercise. *Id.* at 229-230. One such implied authority is the President's power to determine on behalf of the United States the boundaries of foreign states. See *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839).

B. The President also has inherent authority to determine the content of passports insofar as it implements United States foreign policy. A passport is an official instrument of foreign policy through which the United States addresses foreign nations. See *Haig v. Agee*, 453 U.S. 280, 294 (1981). Historically, the Executive has been assumed to have inherent authority to issue passports and determine their content, in the exercise of the President's constitutional power over national security and foreign relations. See *id.* at 293-294.

Today, passport statutes typically further Congress's own enumerated powers or aid the Executive's passport authority, without purporting to constrain the Executive's use of passports as instruments of foreign policy. On the rare occasion when a passport statute encroaches on the

Executive's constitutional authorities, the President has declined to enforce it. Although Congress may enact passport legislation that is necessary and proper to implement its own enumerated powers, it may not regulate passports in a manner that constrains the President's exclusive authority to determine the content of passports as it relates to United States foreign policy, including determinations concerning the recognition of foreign states and their territorial sovereignty.

II. The State Department's policy not to record "Israel" as the place of birth in the passports or consular records of birth abroad of U.S. citizens born in Jerusalem implements the President's decision not to recognize any state's sovereignty over Jerusalem. That policy is also an exercise of the President's inherent authority to determine the content of passports in furtherance of his conduct of foreign policy. The description of a citizen's place of birth in passports operates as an official statement of whether the United States recognizes a state's sovereignty over the relevant territorial area. For this reason, the State Department has established detailed rules governing place-of-birth designations. Reversing its policy with respect to documents issued to U.S. citizens born in Jerusalem would have grave foreign-relations consequences.

III. Because petitioner's suit seeks to overturn a decision that the Constitution assigns exclusively to the President, it presents a political question. See *Baker v. Carr*, 369 U.S. 186, 217 (1962). Petitioner's reliance on an asserted statutory right does not alter that conclusion. Because a basic function of the courts is to interpret statutes and the Constitution, courts presented with a statutory claim that potentially seeks review of a question that the Constitution commits to another Branch should undertake a careful inquiry into the nature of the relief sought and the interaction of that claim with the constitutional commitment at issue. If adjudicating the purported statutory right would entail reviewing or directing a decision that is constitutionally committed to a political Branch, the court should determine that the statute encroaches on the authority vested in that Branch and dismiss the suit. In other words, Congress cannot, by creating a statutory right, confer on the courts the authority to decide a question that the Constitution commits to another Branch.

Section 214(d) cannot be reconciled with the Constitution's grant of the recognition power to the President. By purporting to give petitioner the right to a judicial order directing the State Department to indicate in petitioner's passport that he was born in Israel, the provision seeks to define United States recognition policy. But the President has exclusive constitutional authority not to recognize any sovereignty over Jerusalem and to implement that determination in passports. Petitioner's Section 214(d) claim thus challenges a decision constitutionally committed to the President. The court of appeals therefore correctly dismissed this case as nonjusticiable.

IV. The question whether Section 214(d) is unconstitutional overlaps to a considerable extent with the question whether petitioner's claim for relief presents a nonjusticiable political question. Should the Court decide as a threshold matter that the case is justiciable, it should hold that Section 214(d) is unconstitutional because it encroaches on the President's exclusive constitutional authority to recognize foreign sovereigns.

\* \* \* \*

**Cross References**

*TPS status for Sudan and South Sudan*, **Chapter 1.D.2.**

*Suspension of Libya from the Human Rights Council*, **Chapter 6.A.3.d(2).**

*Extension of immunities to offices in Bosnia and Herzegovina and Kosovo*, **Chapter 10.E.2.**

*Libya sanctions*, **Chapter 16.A.1.**

*Amendments to Sudan sanctions regulations*, **Chapter 16.A.5.c.**

*Middle East peace process*, **Chapter 17.A.**

*Peacekeeping in Sudan*, **Chapter 17.B.1.**

*Use of force in Libya*, **Chapter 18.A.1.a.(1)**